United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2107

To be argued by
MARGERY EVANS REIFLER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELIZABETH POWELL, DALREE MAPP, KATHERINE PURRINGTON, ALTHEA McDANIELS, PAULA HERBERT, CYNDI REED, and MARGARET GATLING, on behalf of themselves and all other similarly situated,

Plaintiffs-Appellees,

-against-

BENJAMIN WARD, Commissioner of Correctional Services and JANICE WARNE, individually, and as Superintendent of Bedford Hills Correctional Facility,

Defendants-Appellants.

[ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK]

BRIEF FOR DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 75-2107

[ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK]

BRIEF FOR DEFENDANTS-APPELLANTS

Questions Presented

1. When a correctional employee responsible for the general security of a correctional facility has no prior knowledge of or connection with the misconduct with which an inmate is charged, must the employee be disqualified from sitting on the disciplinary panel solely because the charged misconduct purportedly threatens the facility's security?

2. Should the order of the District Court requiring that all inmates placed in segregated confinement receive their hearings within seven days be modified to allow relaxation of this rule in exigent circumstances?

Preliminary Statement

Defendants-appellants Commissioner of Correctional Services and Superintendent of Bedford Hills Correctional Facility ("defendants") appeal from certain portions of an order of the United States District Court for the Southern District of New York (Stewart, J.), entered on June 24, 1975. In accordance with the District Court's opinion of April 23, 1975, the order mandated certain procedures to be used at all disciplinary proceedings at Bedford Hills Correctional Facility which might result in an inmate's placement in segregated confinement.

Defendants appeal from that portion of the order which prohibits certain individuals from sitting on disciplinary panels dealing with security threats and seek to modify that portion of the order which requires that all inmates placed in segregated confinement be afforded their hearings within seven days from the date of confinement.

Statement of the Case*

A. Prior Proceedings

Plaintiffs commenced their civil rights action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). Plaintiffs are inmates at Bedford Hills Correctional Facility, Bedford, New York, who were or might be subject to disciplinary hearings which could result in their placement in a special housing or segregation unit ("segregated confinement").

Plaintiffs challenged the procedures used at the Bedford Hills Adjustment Committee and Superintendent's Proceeding hearings. At the time plaintiffs initiated the action, both panels** were authorized to place inmates in segregated confinement.*** Plaintiffs complained that the

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* This statement of the case will be limited to those prior proceedings and facts relevant to the portions of the order from which defendants appeal.

** Although the Superintendent's Proceeding actually consists of one person (7 N.Y.C.R.R. § 253.2), for the sake of brevity both the Adjustment Committee and Superintendent's Proceeding will be referred to as panels.

***Before the final order in this action was entered, the Department changed its regulations. It limited action by the Adjustment Committee to the imposition of loss of privileges or confinement to the inmate's cell. While under specified situations the Adjustment Committee can confine the inmate to a special housing unit pending an immediate recommendation for a Superintendent's Proceeding, segregated confinement in response to misconduct can be imposed only by a Superintendent's Proceeding. 7 N.Y.C.R.R. §§ 252.3(f), 253.5(e), as amended May 19, 1975.

procedures failed to comport with the standards set forth by the Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974) and that their rights under the Fifth and Fourteenth Amendments to the United States Constitution were being violated. Plaintiffs sought a declaratory judgment and preliminary and permanent injunctive relief.

A five day hearing was held on plaintiffs' motion for a preliminary injunction. Most of the testimony concerned the disciplinary proceedings conducted after a major disturbance on August 29, 1974 involving approximately 50 Bedford inmates, but some testimony as to other proceedings was given as well. Testimony relevant to this appeal (discussed post at 6-9) was presented by inmate-plaintiffs and the Deputy Superintendent for Security who conducted the Superintendent's Proceedings relating to the August disturbance.

In its opinion of April 23, 1975 (A. 62-74)* the District Court found the procedures used by the Bedford Hills panels did not fully meet the requirements of Wolff v. McDonnell, 418 U.S. 539 (1974). The Court granted the motion for a preliminary injunction and mandated certain procedures to be used by the panels.

*All numbers preceded by the letter "A" refer to the appendix submitted to this Court.

With regard to the composition of the panel, the Court noted plaintiffs' argument that the Deputy Superintendent's position created an impermissible degree of bias since the charges in the post-August disturbance cases involved perceived threats to institutional security, a subject of direct concern to the Deputy (A.73).

Citing cases for the proposition that an administrative hearing officer must be impartial, the Court held:

> "We also conclude that it is improper for a prison official whose primary concern is prison security to preside over Superintendent's Proceeding (or Adjustment Committee Proceedings) where the alleged misbehavior purportedly threatened the security of that same institution. We thus enjoin defendants from holding disciplinary proceedings which may result in confinement in special housing where either hearing officers have been witnesses or investigative officers or the Deputy Superintendent for Security Services or someone similarly situated presides over hearings concerning incidents which purportedly threaten the security of the prison (A. 74)."

The two portions of the District Court's order from which defendants appeal state (A. 76).

> "1. Defendants shall conduct all Adjustment Committee or Superintendent's Proceedings, or other disciplinary proceedings that may result in an inmate at Bedford Hills Correctional Facility being confined in a Special Housing Unit or Segregation Unit, in accordance with the following procedures:
>
> * * *
>
> (f) Neither the Deputy Superintendent for Security, nor any person whose job involves direct responsibility for institutional security, shall be a member of any Adjustment Committee or Superintendent's Proceeding at which an inmate is charged with an act which purportedly threatens the security of the prison.
>
> 2. If any inmate is confined to Special Housing or segregation "pending investigation" of charges, a hearing must be held within seven days of the date of her confinement."

B. Testimony of the Hearing

Seven Bedford Hills inmates testified at the hearing. Margaret Gatling was charged with misconduct stemming from the August disturbance and Deputy Superintendent for Security Frances Clement conducted the Superintendent's Proceeding. Gatling testified that prior to the proceeding she told Clement that it would be impossible for her to render a "fair and impartial

verdict" since she was Deputy Superintendent for Security and the disturbance "technically speaking" supposedly threatened the security of the institution(A. 18). Gatling felt that a fair hearing would have been "impossible" (A. 20).

Gatling also testified that she did not attend her Superintendent's Proceeding because she was afraid that criminal charges might be brought and because she "knew already that Miss Clements [sic] was already prejudiced as far as we were concerned" (A. 19). Gatling would have been willing to attend and testify at a hearing before an officer unaffiliated with institutional security (A. 20). Defendants' counsel was not allowed questioning as to why this was so if Gatling was afraid of criminal charges (A. 20). Gatling had not had any prior dealings with Clement (A. 19).

Althea McDaniel testified that Clement conducted her Superintendent's Proceeding relating to charges stemming from the disturbance. McDaniel stated that she believed that Clement had formed an opinion of her or her behavior before the Superintendent's Proceeding (A. 22). The basis for her belief was that in 1973 Clement had written a charge sheet against her and

then sat on an Adjustment Committee or Superintendent's Proceeding which imposed five days segregation (A. 23-25). Clement did not say anything at that time which indicated a like or dislike of McDaniel (A. 25).

Cyndi Reed, Marsha Padilla, and Elizabeth Powell testified that Clement conducted their Superintendent's Proceedings stemming from the August disturbance, however, they offered no testimony at all regarding her bias or impartiality. The two other inmates called by plaintiffs offered no testimony regarding Clement or any panels which she conducted.

Frances Clement testified that she was Deputy Superintendent for Security Services and had held that position for four years (A. 26).* Her duties were the safety and security of the facility (A. 27, 40) and included perimeter and internal security and supervision of the security force (A. 40). Gatling testified that her responsibility included dealing with a disturbance within the facility and that this was the responsibility of every employee (A. 41).

Clement was away on vacation at the time of the disturbance, August 29, 1974 and she did not return until September 1, (A. 28, 45). The specific duty assigned to her with respect to the disturbance was to conduct the Superintendent's Proceedings (A. 45-46). She was not given any responsibility for investigation

*Ms. Clement is now Superintendent of Bedford Hills Correctional Facility.

of the incident and only took part in investigation insofar as she conducted the Superintendent's Proceeding and considered evidence (A. 46).

Clement did not have any discussion with the facility's Superintendent regarding the incident except in receiving the directive to conduct the proceedings and receiving the names of the inmates who were to appear. She knew that eleven of the inmates were not being referred to Superintendent's Proceedings (A. 47-48).

Many inmates had multiple charges leveled against them, up to ten or eleven (A. 52). When asked by plaintiffs' counsel if it was logical to assume that they had done something to merit the charges, Clement replied "I didn't know. I had to rely on the evidence" (A. 52). Clement had conducted approximately fifty Superintendent's Proceedings prior to the disturbance and some of them resulted in dismissals of some or all of the charges (A. 52-53).

POINT I

WHEN A CORRECTIONAL EMPLOYEE RESPONSIBLE FOR THE GENERAL SECURITY OF A CORRECTIONAL FACILITY HAS NO PRIOR KNOWLEDGE OF OR CONNECTION WITH MISCONDUCT WITH WHICH AN INMATE IS CHARGED, THE EMPLOYEE SHOULD NOT BE DISQUALIFIED FROM SITTING ON THE DISCIPLINARY PANEL SOLELY BECAUSE THE CHARGED MISCONDUCT PURPORTEDLY THREATENS THE FACILITY'S SECURITY.

In an extraordinary holding which overreaches all judicial precedent, the District Court barred the Deputy Superintendent for Security from sitting on disciplinary panels of inmates charged with misconduct which purportedly threatens the institution's security solely because the Deputy was responsible for the security of the correctional facility.*

The Court's holding could be based only on a finding of actual bias on the part of Deputy Clement or on an analysis of her respective functions as Deputy Superintendent for Security and the person conducting Superintendent's Proceedings, rather than a factual issue peculiar to this case.

*The Court also disqualified all others similarly situated. While it is unclear who would fall into that class, defendants' argument herein applies with equal force to correction officers, the uniform staff, an Assistant Deputy for Security, and the Superintendent, all of whom are responsible for institution's security.

See Withrow v. Larkin, ____ U.S. ____, 95 S.Ct. 1456, 1463 (1975). An examination of these factors reveals that there is no factual or legal foundation for the District Court's ruling, which is in conflict with the principles set forth by the Supreme Court in the Withrow case.

A.

Deputy Superintendent for Security Clement was responsible for the safety and order of Bedford Hills Correctional Facility, including perimeter and internal security and supervision of the security force. While her position obviously indicates that she would be concerned about the August 29, 1974 disturbance, she was not present at the facility at that time and did not return from vacation until three days later (A. 28, 45).

Indeed, Clement's only duty and only connection with regard to the disturbance was that she was assigned by the Superintendent to conduct the Superintendent's Proceedings of those inmates charged with misconduct during the disturbance (A. 45-46). She did not witness or investigate the incident nor did she press the charges (A. 46). Clement did not discuss the disturbance with the Superintendent (A. 47-48).

When asked by plaintiffs' counsel if it were logical to assume that the inmates had done something to merit the charges, she replied "I didn't know. I had to rely on the evidence" (A. 52). She had dismissed charges in some of the pre-August Superintendent's Proceedings which she had conducted.

Obviously, there is not a scintilla of evidence in Clement's testimony to support a finding of actual bias or even a predisposition on her part. Nor were plaintiffs able to offer any evidence to the contrary. Although Clement conducted the Superintendent's Proceedings of forty-nine inmates allegedly involved in the disturbance, plaintiffs called only two inmates who testified about her conduct or attitude. Margaret Gatling testified that she felt Clement could not render a fair verdict because she was in charge of security and the disturbance "technically speaking" supposedly threatened institutional security (A. 18). No basis for this belief was given. Rather, Gatling simply stated that she "knew already that Miss Clements [sic] was already prejudiced as far as we were concerned" (A. 19).

Althea McDaniel testified that she believed that Clement had formed an opinion of her or her behavior because in 1973 Clement had written a charge sheet against her and then presided at a panel which imposed five days segregation (A. 22-25).

Clement did not say anything which indicated a dislike of McDaniel (A. 25). This alleged bias of course had nothing to do with Clement's position as head of security services. The three other inmates who testified that Clement conducted their Superintendent's Proceedings gave no testimony whatsoever regarding any bias or interest on Clement's part. Manifestly, there is no evidence to support a finding of actual bias on Clement's part.

B.

Nor was there any due process violation in Clement's functioning as both Deputy Superintendent for Security and as the person conducting the Superintendent's Proceedings of those inmates charged with acts which purportedly threatened the security of the correctional facility. Certainly, as the District Court stated, it is established that administrative hearing officer must be impartial. E.g. Withrow v. Larkin, supra; Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). Cf. In re Murchison, 349 U.S. 133 (1955). It does not follow, however, that a correctional employee's general responsibility for security creates such "a risk of unfairness" so "intolerably high" (Withrow, 95 S.Ct. at 1470) that she must be disqualified from sitting on any

disciplinary panel considering misconduct relating to security. The District Court's conclusion was not explained nor were any cases cited for the holding.

The impartiality of administrative hearing panel was discussed only last term by the Supreme Court. In Withrow v. Larkin, supra, 95 S.Ct. 1456, a doctor sought and obtained a preliminary injunction enjoining an adjudicative hearing to be conducted by a state board which regulated the practice of medicine. By statute, the Board could both investigate and present charges and rule on the charges and impose punishment. The Board had held an investigative hearing, pressed charges, issued a decision finding probable cause, and filed a complaint with the District Attorney's office. Id. at 1460-1462.

The Supreme Court held that it was an abuse of discretion to issue the preliminary injunction because it was "quite unlikely" that the doctor would ultimately prevail on the merits of the due process issue raised. Id. at 1464. Reviewing its earlier cases which had considered similar claims, the Court rejected any per se rule that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias. Id. at 1464-1468. The mere exposure to evidence presented in a nonadversary procedure was held insufficient to impugn the fairness of the board members at the subsequent

adversary hearing. Id. at 1468.* See also Federal Trade Comm'n. v. Cement Institute, 333 U.S. 683 (1948); NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947). Compared to the Board's prior involvement in the Withrow case, Deputy Clement's general responsibility for security is so remote from the hearings that she conducted as to render plaintiffs' claim frivolous.

In Richardson v. Perales, 402 U.S. 389, 410 (1971), the Court refused to find a constitutional violation because the social security hearing officer acts as an examiner charged with developing the facts at the hearing. The Court said:

> "Neither are we persuaded by the advocate-judge-multiple-suggestion. It assumes too much and would bring down too many procedures designed and working well, for a governmental structure of great and growing complexity." Id. at 410.**

*Nor did the Court think the situation different because the Board had made a probable cause finding which was filed with a prosecutor. Id. at 1468-1470.

**These cases and the instant case are distinguishable from those prohibiting the initial decisionmaker from reviewing his own decision. E.g. Morrissey v. Brewer, supra, 408 U.S. at 485-486; Goldberg v. Kelly, supra, 397 U.S. at 271 (1970). See Withrow, 95 S.Ct. at 1470, n. 25.

In Wolff v. McDonnell, 418 U.S. 539 (1974) the prison adjustment committee under review was composed of the Associate Warden for Custody, the Correctional Industries Superintendent, and the Reception Center Director and was charged with reviewing all misconduct reports. Id. at 550 and n. 8. The Supreme Court declined to rule that the committee was not sufficiently impartial to satisfy due process. Id. at 571.

Other courts which have spoken on the issue of the impartiality of a prison disciplinary panel have involved factual situations not present in the instant case. E.g. Cluchette v. Procunier, 497 F. 2d 809, 820 (9th Cir. 1974), on rehearing, 510 F. 2d 613 (1975), cert. granted, sub nom. Enomoto v. Cluchette, _____ U.S. _____, 43 U.S.L.W. 3641 (June 9, 1975) (due process requirement of a neutral hearing body is satisfied by panel of prison officials provided that no member participated in the case as an investigating or reviewing officer or was a witness or had personal knowledge of the material facts); United States ex rel. Miller v. Twomey, 479 F. 2d 701, 716 (7th Cir. 1973), cert. den. sub nom. Gutierrez v. Dept. of Public Safety, 414 U.S. 1146 (1974) (factual determination should be made by one other than

person reporting the violation);* Landman v. Royster, 333 F. Supp. 621, 653 (E.D. Va. 1971)(participation in occurence giving rise to the charge bars a person from sitting in judgment).

In Braxton v. Carlson, 483 F. 2d 933 (3rd Cir. 1973), the Court ruled that an associate warden's efforts to bring a near mutiny at a federal prison under control did not disqualify him from sitting on the disciplinary panel because he had no personal involvement with any of the charged inmates and wa. neither an investigator nor a witness. Id. at 941. In Meyers v. Alldredge, 492 F. 2d 296 (3rd Cir. 1974), the Court held that an impartial tribunal could not be composed of an official who had a direct or substantial involvement in the case, normally the charging and investigating officer. The Court specially excluded those "tangentially" affected, "such as prison officials who may have some administrative connection with such misconduct prior to hearings." Id. at 306. See also Taylor v. Schmidt, 380 F. Supp. 1222 (W.D. Wisc. 1974)(Court considering disciplinary procedures found, inter alia, that associate warden for security is particularly subject to forces indicating pre-disposition to believe the misconduct report but order contained no relief as to content of panel. Id. at 1226, 1232).

*In Morrissey v. Brewer, supra, the Supreme Court held that the determination of probable cause for parole revocation could be made by a parole officer other than the one who reported the violation or recommended revocation. 408 U.S. at 486.

Deputy Clement was not a witness to the disturbance, she did participate in the investigation, and she did not draw up the charges.* She did not discuss the case with the Superintendent (but see Crooks v. Warne, 516 F. 2d 837, 839 [2d Cir. 1975]) nor had she have any personal knowledge of the material facts. In short, Deputy Clement had nothing whatsoever to do with the August disturbance or the inmates charged with related misconduct until she presided at the Superintendent's Proceedings.

It follows a fortiori from the cases discussed above that due process does not require that a correctional employee responsible for safety and order in a correctional facility be disqualified from a disciplinary panel merely because the inmates are charged with misconduct purportedly threatening to institutional security. The mere suspicion of bias or conflict in the two functions is no predicate for the District Court's order and there is no specific foundation in the record presented to this Court for the holding.

*According to the Department's own regulations, Clement could not have conducted the proceeding if she had witnessed the incident, been directly involved in it, or prepared the formal charge. 7 N.Y.C.R.R. § 253.2(d).

> "Without a showing to the contrary, state administrators, 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" Withrow, 95 S.Ct. at 1468, quoting United States v. Morgan, 313 U.S. 409, 421 (1941).

The District Court recognized this principle in its earlier decision in this action denying Carol Crooks' motion for a preliminary injunction. (A.54 - 61). In response to Crooks' complaint that a hearing officer at one of her Superintendent's Proceedings had discussed her case with officials who sat on her prior Adjustment Committees, the Court said of the hearing officer:

> "he is still obligated by Wolff to act impartially and base his decision on the evidence presented to him at the Superintendent's Proceeding." (A. 61).

Since it is highly unlikely that plaintiffs will ultimately prevail on the merits of this claim, it was an abuse of discretion for the District Court to issue a preliminary injunction. Withrow, 95 S.Ct. at 1464.

POINT II

THE ORDER OF THE DISTRICT COURT REQUIRING THAT ALL INMATES PLACED IN SEGREGATED CONFINEMENT RECEIVE THEIR HEARINGS WITHIN SEVEN DAYS SHOULD BE MODIFIED TO ALLOW RELAXATION OF THIS RULE IN EXIGENT CIRCUMSTANCES.

In a memorandum issued to the correctional facilities on March 12, 1975, before a decision was rendered by the District Court in this action, the facilities were advised:

> "Prompt Proceedings
>
> Once it is determined that an inmate should be accorded an Adjustment Committee or Superintendent's Proceeding, such proceeding shall be held promptly.
>
> Insofar as practicable an inmate who is in confinement awaiting an Adjustment Committee or Superintendent's Proceeding, should be accorded a preference over inmates awaiting such proceedings but not in confinement.
>
> In the absence of exigent circumstances, as a guideline: for inmates confined and awaiting an Adjustment Committee or Superintendent's Proceeding, the Adjustment Committee proceeding should be held within three days and the Superintendent's Proceedings within seven days; for inmates not in confinement, the Adjustment Committee proceeding may be held within seven days and the Superintendent's Proceeding within 14 days."
>
> Memorandum from William C. Donnino, Deputy Commissioner and Counsel at 2, March 12, 1975.*

*Annexed hereto as Exhibit "A".

Accordingly, given normal circumstances, defendants raise no objection to the portion of the District Court's order requiring that an inmate placed in segregated confinement receive her hearing within seven days, since the Department's own guidelines are to the same effect. However, because certain emergency situations might arise which could render implementation of the rule impossible, defendants request that the order be modified with the prefix "absent exigent circumstances".

The immediate situation which comes to mind in the prison context is a disturbance involving a substantial number of inmates or violence which prevents the ordinary functioning of the prison. Thus, in a situation of a riot or escalating violence, the courts have uniformly held that normal due process requirements may be delayed. E.g. Morris v. Travisano, 509 F. 2d 1358, 1360-1361 (1st. Cir. 1975); Gray v. Creamer, 465 F. 2d 179, 185, n. 6 (3rd Cir. 1972); Mills v. Oliver, 367 F. Supp. 77, 79-80 (E.D. Va. 1973). See Hoitt v. Vitek, 497 F. 2d 598, 600 (1st Cir. 1974).

As the Mills Court stated:

> "Although an inmate is always entitled to a hearing as soon as practicable, flexibility is inherent in such a rule. The Court notes that in the aftermath of the riot, not only was an investigation necessary in order to determine

> which inmates were to be properly charged, but a large number of cases requiring Adjustment Committee and Classification Committee action were suddenly thrust upon prison authorities." Id. at 79-80.

This same rule has been applied to allow delay of an inmate's transfer hearing when there is a compelling need for an immediate transfer. E.g. Newkirk v. Butler, 499 F. 2d 1214, 1219 (2nd Cir. 1974), vacated as moot sub. nom. Preiser v. Newkirk, __ U.S. __, 45 L. Ed. 2d 272 (1975); Gomes v. Travisano, 490 F. 2d 1209, 1215 and n. 9 (1st Cir. 1973), vacated and remanded, 418 U.S. 908 (1974), affd. in relevant part, 510 F. 2d 537 (1st Cir. 1974). Delays in implementing due process standards have also been allowed when the prison authorities alleged the inmate was involved in a conspiracy to escape, Biagiarelli v. Sielaff, 483 F. 2d 508 (3rd Cir. 1973) and to prevent a riot. LaBatt v. Twomey, 513 F. 2d 641, 645-646 (7th Cir. 1975). The illness or other forced incapacity of the inmate or a necessary witness might also occasion delay of a hearing.

Accordingly, in recognition of the cases which permit hearings to be delayed in unusual or emergency situations, the portion of the District Court's order requiring a segregated inmate to receive her hearing within seven days should be modified to include the words "absent exigent circumstances."

CONCLUSION

THE PORTION OF THE DISTRICT COURT'S ORDER GRANTING A PRELIMINARY INJUNCTION ON THE ISSUE OF SECURITY PERSONNEL'S DISQUALIFICATION FROM SITTING ON DISCIPLINARY PANELS SHOULD BE REVERSED AND THE PORTION OF THE ORDER REQUIRING HEARINGS TO BE HELD WITHIN SEVEN DAYS SHOULD BE MODIFIED BY THE WORDS "ABSENT EXIGENT CIRCUMSTANCES."

Dated: New York, New York
November 3, 1975

Respectfully submitted,

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STATE OF NEW YORK

DEPARTMENT OF CORRECTIONAL SERVICES

THE STATE OFFICE BUILDING CAMPUS

ALBANY, N.Y. 12226

BENJAMIN WARD
COMMISSIONER

March 12, 1975

M E M O R A N D U M

TO: Superintendents, Group and Division Heads

FROM: William C. Donnino, Deputy Commissioner & Counsel

SUBJECT: Chapter V and VI Proceedings

After one year's review of Chapter V and VI Proceedings, the following observations, comments and directions are set forth:

In General

It is not necessary to provide a cover letter or memorandum when forwarding reports of Chapter V or VI proceedings to Central Office absent a need to supplement the information in the reports. Information recorded on all forms must be legible.

Inmate Interview

Adjustment Committee, Superintendent's Proceeding, Time Allowance and Protective Admission proceedings must involve an in-person interview with the inmate. In Time Allowance proceedings where the inmate is not present in the facility, an in-person interview is not required if the maximum good behavior allowance available is to be credited against the inmate's term.

Inmate Presence

An inmate who refuses to attend a proceeding shall be advised that the proceeding will be conducted in his absence if he continues in his refusal to attend. If he thereafter continues to refuse to attend the proceeding, the proceeding may be conducted in his absence. A record shall be made of the time, place, manner and persons present when the inmate was advised to attend the proceeding and refused. If the inmate refuses to attend Superintendent's Proceedings, the inmate shall be presumed to have denied the charge(s).

Exhibit "A"

Pending Criminal Charges

A Superintendent's Proceeding shall not be deferred or delayed pending the results of an investigation or prosecution of an inmate for an act committed in the institution that may constitute both a crime and a violation of the Department rules.

Prompt Proceedings

Once it is determined that an inmate should be accorded an Adjustment Committee or Superintendent's Proceeding, such proceeding shall be held promptly.

Insofar as practicable an inmate who is in confinement awaiting an Adjustment Committee or Superintendent's Proceeding, should be accorded a preference over inmates awaiting such proceedings but not in confinement.

In the absence of exigent circumstances, as a guideline: for inmates confined and awaiting an Adjustment Committee or Superintendent's Proceeding, the Adjustment Committee proceeding should be held within three days and the Superintendent's Proceedings within seven days; for inmates not in confinement, the Adjustment Committee proceeding may be held within seven days and the Superintendent's Proceeding within 14 days.

Superintendent's Proceedings

The charges must be carefully drawn to specify the incident of behavior involved.

The entire proceeding shall be electronically recorded.

A new form ("Superintendent's Proceeding Notice and Assistance") is attached. (It should be duplicated for immediate use. It will be replaced by a preprinted popapart form in the near future.) It is for use by the person directed to serve the inmate with the formal Superintendent's Proceeding charges. In automatic review cases, it should be forwarded to the Commissioner with the Superintendent's Proceeding records.

Where an inmate admits a variation of the charge at a Superintendent's Proceeding, he must admit to facts encompassed or contained in one or more of the formal charges. The admitted facts must constitute a danger to life, health, security or property if there is to be confinement to a Special Housing Unit /Chapter V, section 253.5 (a) 7. The Superintendent's Proceeding Record Sheet must clearly specify what acts the inmate admits.

The person conducting the proceeding, in addition to reliance upon written evidence, should interview employees who submitted the misbehavior reports as well as others who may be

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

SUSAN D. CHIECO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellants herein. On the 3rd day of November , 1975 , she served the annexed 3 copies of brief upon the following named person :

STEPHEN LATTIMER, ESQ.
Bronx Legal Services, Corp. C
579 Courtlandt Avenue
Bronx, New York 10451

Attorney in the within entitled action by depositing a true and correct copy thereof, 3 copies of brief properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Susan D. Chieco

Sworn to before me this
3rd day of November , 1975

Margery Evans Reffler
Assistant Attorney General
of the State of New York